UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DENNIS C. ROWELL,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**Civil No. 96-340-P-H**
	)	
MASSACHUSETTS CASUALTY	)	
INSURANCE COMPANY,	)	
DEFENDANT	)	

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL AND PLAINTIFF'S MOTION IN SUPPORT OF ENTRY OF JUDGMENT

A. BACKGROUND

The plaintiff sought disability benefits under an insurance policy from the defendant. The case was tried to a jury and on April 6, 1998, the jury returned a special verdict in favor of the plaintiff, finding that he became totally disabled within the meaning of the insurance policy beginning on July 12, 1993, and continuing to the date of the verdict; and that he provided written proof of loss to the defendant as soon as reasonably possible.

The defendant now moves for a new trial; the plaintiff moves for entry of judgment on the verdict seeking not only benefits accrued through the date of the trial but also a lump sum payment representing the present value of future benefits.

B. DEFENDANT'S MOTION FOR NEW TRIAL

The defendant makes several arguments that it claims entitle it to a new trial: first, that I erroneously excluded testimony and other evidence related to its defense of prejudice based upon late proof of loss; second, that it was error to allow the plaintiff to call the defendant's expert, Dr. McNeil, in the plaintiff's case- in-chief; third, that I applied different rules for the admission of evidence to the parties, resulting in the erroneous and unfairly prejudicial admission of certain medical diagnostic opinions over the defendant's objection; and fourth, that the jury's verdict was against the weight of the evidence. I hereby **DENY** the defendant's motion and address each of its arguments in order.

1. Prejudice Due to Late Proof of Loss

The defendant claims that I wrongly precluded it from introducing testimony and other evidence showing prejudice due to the late proof of loss. Any error, however, was harmless because the Maine Law Court has established that

> to avoid either its duty to defend or its liability [under an insurance contract] based on an insured's delay in giving notice, a liability insurer must show (a) that the notice provision was in fact breached, *and* (b) that the insurer was prejudiced by the insured's delay.

Ouellette v. Maine Bonding & Cas. Co., 495 A.2d 1232, 1235 (Me. 1985) (emphasis added). This is a two-part test.

Here, the Notice of Claim and Proof of Loss provisions in the disability policy required a claimant to submit its proof of loss "as soon as reasonably possible." The jury found specifically that Dennis Rowell did "provide a written proof of loss to Massachusetts Casualty Insurance Company

as soon as reasonably possible." Jury Verdict Form, No. 4. Because there was thus no breach of the notice provision, prejudice is irrelevant.

2. Allowing Plaintiff to Call Defendant's Expert Witness in its Case-in-Chief

The defendant claims that it was error resulting in unfair prejudice and substantial injustice to allow the plaintiff to call Dr. McNeil, the defendant's expert, in its case in chief. I conclude that the defendant has procedurally waived the objection.

For reasons that I will not go into here, but that appear on the record of the hearing of March 26, 1998, I reluctantly allowed the plaintiff to call the defendant's witness in the plaintiff's case-in-chief. Severe problems arose during his testimony and his testimony was recessed for several days while the trial went forward and information was gathered concerning accusations against the defendant of a Rule 26(e) discovery violation. After exceedingly acrimonious exchanges between the lawyers upon the expert witness's return, the plaintiff squarely raised the issue of mistrial on April 6, 1998. Before ruling, I stated on the record: "I think this is the first case in which I've allowed one side to call the other side's expert, and I suspect it will be the last one for a long while." I proceeded to propose a solution short of mistrial, but the plaintiff's lawyer insisted that only a mistrial would suffice. The defendant's lawyer, however, opposed a mistrial and supported the proposal that I had offered. The lawyers proceeded to discuss the matter further off the record in a recess and then returned with an agreed solution. Under these circumstances—where I had clearly indicated my regret at having permitted the plaintiff to call the defendant's expert and my unwillingness to do it again—the defendant's resistance to the plaintiff's motion for a mistrial clearly

waived any objection to my earlier decision allowing the plaintiff to call the defendant's expert. The defendant could have consented to the plaintiff's request for a mistrial with the assurance that the plaintiff would not be permitted to call the defendant's expert in its case-in-chief in the second trial. Instead, the defendant tried to have its cake and eat it too, in the sense that if the verdict had been in its favor it would have defended the denial of a mistrial, whereas with a plaintiff's verdict, as occurred here, it now seeks to upset the verdict. This is exactly the choice I made clear I wished to deny to both sides when I stated on the record: "What I don't want to do is put this in a position where one side wins either way in the sense that if there's a sufficient likelihood of mistrial, it should go forward and if the verdict's in your favor you keep it and if it's against you you've got an appeal—a mistrial. That's not what I want to come out of this with."

Although I may have been unwise in permitting the plaintiff to call the defendant's expert in the plaintiff's case-in-chief, it was not an abuse of discretion under the court's power under Fed. R. Evid. 611 and the authorities that I referred to on the earlier record. But even if it were, the waiver I have recounted above prevents it being used now as a justification for a new trial.

3. Admission of Medical Diagnostic Opinions

The defendant argues that in ruling on the admissibility of evidence, I treated the parties differently, resulting in the erroneous and unfairly prejudicial admission of certain medical diagnostic opinions over the defendant's objection. Specifically, the defendant objects to the admission of the plaintiff's Exhibits 14A, 14B, 14G, 14L, 14M, 14M1, and 19X, which were medical records containing inadmissible medical diagnostic opinions. I admitted those plaintiff's exhibits on the ground that the defendant had failed to file written objections as required by the

December 4, 1997, Final Pretrial Order. That was clearly an appropriate ruling, standing on its own. But the defendant argues that I was unfairly inconsistent in my rulings—specifically that I did not apply the same rule in ruling on the admissibility of certain defense exhibits, specifically, Exhibits 57A, 58A, and 109.

Exhibits 57A and 58A are excerpts of pleadings and interrogatories from a separate lawsuit in which the plaintiff was a party. At least parts of them were displayed to the jury on an overhead projector. Although the defendant's current motion suggests otherwise, it is my recollection that it did not seek to have either of these exhibits admitted on the ground that the plaintiff failed to comply with the Final Pretrial Order. (Neither party has provided a transcript.) It therefore has waived the argument as to these two exhibits. In any event, I allowed the jury to hear about the relevant contents of the documents and excluded only the documents themselves under Rule 403 because they involved a different lawsuit and could needlessly have confused the jury. My review of the proceedings indicates that the defendant did argue for the admission of Exhibits 37, 38, 41, and 109 on the ground that the plaintiff had failed to comply with the Final Pretrial Order. I admitted Exhibits 37 and 38 on precisely that ground, as I had done with the plaintiff's exhibits; I did not need to apply the ruling to Exhibit 41, because it was already in evidence when the defense moved to have it admitted. As to Exhibit 109—a three-inch pile of photocopied checks—I excluded those under Fed. R. Evid. 403 as needlessly cumulative for the jury to have to examine.

Thus, I treated the parties evenhandedly on this issue, and there was no error in holding the defendant to its failure to object to the medical records in accordance with the Final Pretrial Order.

4. The Jury's Verdict Was Against the Clear Weight of the Evidence

The defendant's final argument is that the jury's finding of disability is not supported by the evidence. Specifically, the defendant claims that (1) there is no expert medical testimony that the plaintiff was ever disabled during 1993; and (2) the plaintiff claimed in the pleadings of other lawsuits that he was available to work as an insurance agent.

As to the first argument, under the terms of the policy total disability is defined as the "substantial inability to perform the material duties of your work due to Injury or Sickness." There is no authority for requiring expert testimony under this contractual provision. The plaintiff introduced the testimony of the plaintiff himself and witnesses who had contact with the plaintiff during the challenged period to support his claim that he was disabled. The jury also heard the testimony of Drs. McNeil and Garnett, two psychiatrists who saw the plaintiff (Dr. McNeil after-the-fact). Based on this evidence, I find that a jury could reasonably conclude that the plaintiff was totally disabled within the terms of the policy during 1993.

As to the second argument, the defendant presented evidence of the plaintiff's pleadings, affidavits and answers to interrogatories from a separate lawsuit that stated that the plaintiff was available and able to work as an insurance agent. The defendant also questioned the plaintiff and the lawyer who drafted the pleadings. In addition, the defendant presented the testimony of co-workers and former clients of the plaintiff, seeking to prove that he was in fact working during the time that he was claiming disability. After considering the evidence and weighing its credibility, however, the jury concluded that despite the defendant's attempt to prove otherwise, the plaintiff was, in fact, disabled through the period in question in the lawsuit.

The fact that reasonable minds might differ over the credibility and weight of the evidence adduced at trial is no grounds for reversing the jury's verdict. A "jury verdict is to stand unless

'seriously erroneous.' This standard is strict. Mere disagreement with the verdict will not justify the granting of a new trial." Keeler v. Hewitt, 697 F.2d 8, 11 (1st Cir.1982) (internal citation omitted). "[A] jury's verdict on the facts should only be overturned in the most compelling circumstances." Wells Real Estate, Inc. v. Greater Lowell Board of Realtors, 850 F.2d 803, 811 (1st Cir. 1988). I find that the evidence is sufficient to support the jury's verdict.

C. PLAINTIFF'S MOTION IN SUPPORT OF ENTRY OF JUDGMENT

The jury's verdict entitles the plaintiff to recover disability benefits under the policy. The parties disagree, however, as to the type and amount of the damages that I should award. In addition to seeking an award of past due benefits and costs, the plaintiff argues that a lump sum award of future benefits is appropriate in this case on the grounds that the defendant has repudiated the insurance contract with the plaintiff and/or that the jury's finding that the plaintiff's total disability is continuing justifies a finding of "permanent" disability.

In opposing the plaintiff's renewed request for future damages, the defendant notes correctly that at the March 26, 1998 pretrial motion hearing, I ruled preliminarily against the plaintiff on the issue of future damages and held that the plaintiff could claim as damages only the amount of benefits accrued through the date of trial. The defendant asks me to reaffirm my earlier ruling that future damages are not available on the facts of this case as a matter of law, even if there is evidence of repudiation. I now reaffirm my ruling of March 26, 1998, and review briefly the basis for my decision.

Section 243 of the Restatement of Contracts states:

> Where at the time of the breach the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not related to one another, his breach by non-performance as to less than the whole, whether or not accompanied or followed by a repudiation, does not give rise to a claim for damages for total breach.

2 Restatement (Second) of Contracts § 243(3) at 250-51 (1981). Illustration 5 of that section is a disability insurance fact pattern in which the plaintiff suffered total permanent disability, and the carrier initially began paying monthly benefits under the policy, but then unjustifiably stopped making payments. The Restatement concludes that under such circumstances the insured has a claim against the insurer for partial breach only—and that the result is the same even if the carrier repudiates by telling the insured that it will not make the payments. Id. at 254-55. The fit is perfect.[1]

I therefore hold that a lump sum award for future benefits is not appropriate in this case, and that the plaintiff is entitled to recover for benefits accrued during the period of July 12, 1993 through April 6, 1998.

D. CONCLUSION

The defendant's motion for new trial is **DENIED**. The plaintiff's motion for entry of judgment is hereby **GRANTED** in part and **DENIED** in part. The parties shall provide to the Clerk's Office

[1] In the absence of applicable Maine caselaw, the Law Court has regularly relied on the Restatements. DuPuis v. Federal Home Loan Mortgage Corp., 879 F. Supp. 139, 142 (D. Me. 1995) (citing Bonk v. McPherson, 605 A.2d 74, 78 (Me. 1992)). I note that the cases relied on by the plaintiff do not support its arguments for repudiation. On the contrary, those cases take the position that a defendant insurance company that denies a claim for disability insurance in good faith on the ground that the claimant has failed to comply with the terms of the policy is *not* considered to have repudiated the contract. See New York Life Ins. Co. v. Viglas, 297 U.S. 672, 676 (1936); Mobley v. New York Life Ins. Co., 295 U.S. 632, 638 (1935). In addition, in both cases, the Supreme Court was applying pre-Erie federal common law principles that do not control here.

within seven (7) days the amount to be entered in the judgment in accordance with the jury's verdict and this Order.

SO ORDERED.

DATED THIS 24TH DAY OF JUNE, 1998.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE